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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1997

W.L. HODGE,

Petitioner

v.

JOHN DALTON, officially as
Secretary of the Navy

Respondent.

Petition For Writ of Certiorari
To the United States Court of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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3 copies

QUESTION PRESENTED

Whether Petitioner, W.L. Hodge, a uniformed member of the United States Marine Corps, is an "employee" within the meaning of 42 U.S.C. Section 2000e-16(a) while part-timed employed by a non-appropriated funded agency of the U.S. Navy during his off-duty hours so as to be eligible to invoke the protections and procedures under Title VII of the Civil Rights Act of 1964.

PARTIES TO THIS PROCEEDING

Petitioner is W.L. Hodge. Respondent is John Dalton, Secretary of the Navy.

PETITION FOR WRIT OF CERTIORARI

Petitioner W.L. Hodge respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 19, 1997 in order to resolve an issue of first impression regarding a dispositive interpretation of "employee" within the meaning of 42 U.S.C. Section 2000e-16(a).

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 107 F.3d 705 (9th Cir. 1997).

JURISDICTION

On March 1, 1995, Petitioner W.L. Hodge filed an action in U.S. District Court for the District of Hawaii seeking a declaratory judgment and mandamus action against the Respondent John Dalton in his official capacity as Secretary of the Navy compelling the agency to process his complaint of unlawful discrimination under Title VII in his capacity as a part-time employee of a non-appropriated funded agency of the U.S. Navy. Jurisdiction of the district court was invoked under 42

U.S.C. Section 2000e-5.

On May 31, 1995, the district court granted the Respondent's motion for summary judgment. Petitioner timely appealed the final judgment order May 23, 1995. The jurisdiction for the appeal was invoked under 28 U.S.C. Section 1291. The United States Court of Appeals for the Ninth Circuit entered judgment on February 19, 1997 affirming the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 2000e-16(a) provides in relevant part that:

> All personnel actions affecting employees or applicants for employment...in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds)...shall be made free from any discrimination based on race, color, religion, sex, or

national origin.

STATEMENT OF THE CASE

Petitioner W.L. Hodge was at all times relevant a active duty Gunnery Sergeant of the U.S. Marine Corps. At the same time, Petitioner was employed part-time, during his normal off-duty hours, at the Morale, Welfare,and Recreation Enlisted Club located at the U.S. Marine Base Hawaii. The Enlisted Club is a nonappropriated funded entity of the U.S. Navy.

Petitioner and his MWR supervisor got into a dispute concerning the number of hours Petitioner was required to work. Thereupon, Petitioner, an Afro-American, attempted to file a complaint of unlawful discrimination under Title VII of the Civil Rights Act. with the Respondent agency. Mr. Charles Garza, Formal Complaints Manager at Camp Pendleton, California, rejected Petitioner's complaint on the ground that Petitioner, as a uniformed member of the Marine Corps, was excluded from Title VII coverage under the terms of 29 C.F.R. Section 1614.103(d)(1).

Petitioner subsequently filed an action in district court for a declaratory order and mandamus com-

pelling the Respondent agency to process his complaint. The district court granted the Respondent's motion for summary judgment on the ground that uniformed members of the military departments were excluded from Title VII coverage because such persons were not "employees" and that the doctrine of intramilitary immunity applied as a bar for such persons bringing suit against a military department for injuries occurring from activities incident to military service.

On appeal to the United States Court of Appeals for the Ninth Circuit, the circuit panel agreed virtually verbatim with the district court and affirmed.

REASONS FOR GRANTING THE WRIT

The opinion of the United States Court of Appeals for the Ninth Circuit regarding non-coverage under Title VII for uniformed members of the Armed Services who also are employed part-time with a entity supported by non-appropriated funds is contrary to the clear language of 42 U.S.C. Section 2000e-16(a) and the undisputed fact that for Title VII purposes, Petitioner was a Section 2000e-16(a) employee, regardless of his active duty military status.

Certiorari is appropriate to because the court of appeals has decided an important question of federal law that should be decided by this Court.

CONCLUSION

For the reasons cited above, a writ of certiorari should be granted.

Dated: Honolulu, HI May 17,1997

William Tagupa,
Attorney for Petitioner
W.L. Hodge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. L. HODGE, *Plaintiff-Appellant,* v. JOHN DALTON, officially as Secretary of the Navy, *Defendant-Appellee.*	No. 95-16036 D.C. No. CV-94-00970-HG OPINION

Appeal from the United States District Court
for the District of Hawaii
Helen Gillmor, District Judge, Presiding

Argued and Submitted
December 11, 1996—San Francisco, California

Filed February 19, 1997

Before: Betty B. Fletcher, Charles E. Wiggins, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

SUMMARY

Individual Rights/Civil Rights

The court of appeals affirmed a judgment of the district court. The court held that uniformed servicemembers are excluded from coverage under Title VII of the Civil Rights Act of 1964.

Appellant W.L. Hodge was an active-duty member of the United States Marine Corps. During off-duty hours, he worked as manager of an enlisted club within his base's Morale, Welfare and Recreation (MWR) Department.

When Hodge and his supervisor at MWR disagreed on his required hours of work, Hodge filed an Equal Employment Opportunity Commission (EEOC) complaint alleging racial discrimination. The complaint was dismissed on the ground that Hodge was excluded from Title VII coverage as a uniformed servicemember.

Hodge brought a federal action against appellee John Dalton, the Secretary of the Navy, requesting the district court to require Dalton to process his complaint in accordance with Title VII procedures.

The district court granted Dalton's motion to dismiss for lack of subject-matter jurisdiction. Hodge appealed.

[1] The United States is immune from suit unless it consents to waive its sovereign immunity. Any waiver must be unequivocally expressed; limitations and conditions on the waiver must be strictly observed and exceptions are not to be implied. [2] The underlying action was brought against Dalton in his official capacity. Sovereign immunity barred Hodge's action unless a waiver of immunity existed.

[3] The United States is not an employer amenable to suit under the general provisions of Title VII. Suits involving federal employment are governed by 42 U.S.C. § 2000e-16. Section 2000e-16 provides that personnel actions affecting employees in military departments, as defined in § 102 of Title 5, and executive agencies as defined in § 105 (including employees who are paid from nonappropriated funds), must be free of discrimination based on race.

[4] Congress granted the EEOC rulemaking authority to implement and enforce Title VII. The EEOC promulgated

regulations defining the forms of discrimination prohibited by Title VII and establishing the procedures for enforcement. The EEOC interprets Title VII as not applying to complaints of discrimination by active-duty servicemembers.

[5] Hodge was an active-duty member of the Marine Corps and thus a uniformed member of a military department. He was therefore excluded from coverage by EEOC regulations. [6] The Ninth Circuit has held that the term "military departments" in § 2000e-16 includes only civilian employees of the Army, Navy, and Air Force, and not enlisted personnel.

[7] A "military department" must come under the definition of § 102 to be covered by Title VII. Section 102 does not distinguish between military departments operated out of appropriated funds and those using nonappropriated funds. The term "military department" is never used in § 105. Although MWR was apparently operated largely out of nonappropriated funds, § 2000e-16's discussion of nonappropriated funds modifies the definition of "executive agencies," not the definition of "military departments."

[8] Although Title VII protects civilian employees of the military, it does not protect military personnel. Hodge was an active-duty member of the military. The fact that a civilian could have held his position at the enlisted club did not change his status. [9] The action involved conduct that was integrally related to the military's unique structure. The MWR is governed by a military chain of command. The action thus involved a legal challenge to a senior officer.

[10] Under the doctrine of intramilitary immunity, members of the armed forces may not bring an action against the government or armed service personnel for injuries during activity under the control or supervision of a commanding officer. [11] The doctrine is applicable whenever a legal action would require a civilian court to examine decisions

regarding management, discipline, supervision, and control of members of the armed forces.

[12] Although Hodge's immediate supervisors were civilians, the military chain of command retained direct control over MWR and its employees. As an active-duty member of the military, Hodge was at all times subject to military discipline. His employment was "incident to military service" and fell within the doctrine of intramilitary immunity.

[13] An agency must publish proposed rulemaking in the Federal Register unless persons subject to the rule are named and are either personally served or otherwise have actual notice. The agency must give interested persons an opportunity to participate through submissions of data, views, or argument.

[14] The EEOC published a notice of proposed rulemaking and requested public comment. The EEOC did not propose language specifying that uniformed members of the armed forces were not covered by Title VII. The EEOC issued a final regulation that exempted uniformed members of military departments from Title VII coverage. [15] The exclusion of uniformed members from coverage [16] was promulgated pursuant to a congressional grant of authority to implement and enforce § 2000e-16. Congress did not intend to vest the EEOC with the power to review the employment practices of the armed forces.

COUNSEL

William Tagupa, Honolulu, Hawaii, for the plaintiff-appellant.

Sandra Wien Simon, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

T.G. NELSON, Circuit Judge:

OVERVIEW

Plaintiff/appellant W. L. Hodge filed an action in federal district court seeking declaratory and mandamus relief against defendant/appellee John Dalton in his official capacity as Secretary of the Navy. Specifically, Hodge sought to compel defendant Dalton to process his formal complaint of racial discrimination in accordance with established procedures of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e ("the Act" or "Title VII"), and appropriate federal regulations. The district court dismissed the action, finding that it lacked jurisdiction over the matter. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

FACTS AND PROCEDURAL HISTORY

The facts of this case are not in dispute. Hodge is an active-duty service member in the United States Marine Corps. He is currently assigned to duty at Camp H.M. Smith, Marine Corps Base Hawaii, on the island of Oahu, Hawaii, in postal operations. In addition to his military assignment, Hodge worked as a duty manager during his off-duty hours at the United States Marine Corps Base enlisted club at Kaneohe, Hawaii. The enlisted club is an entity within the base's Morale, Welfare and Recreation ("MWR") Department.

After Hodge and his supervisor at the MWR got into a dispute concerning the number of hours Hodge was required to work, Hodge attempted to file an Equal Employment Opportunity Commission ("EEOC") complaint with the MWR personnel office. The complaint alleged racial discrimination. Mr. Charles Garza, Formal Discrimination Complaints Manager at Camp Pendleton, California, rejected Hodge's com-

plaint on the ground that Hodge was specifically excluded from Title VII coverage as a uniformed service member.

Hodge subsequently filed the present case in federal district court, seeking a declaratory judgment or mandamus relief. Specifically, Hodge moved the district court to compel Dalton to process his formal complaint of discrimination in accordance with established Title VII procedures and appropriate federal regulations. In the alternative, Hodge sought to have the district court order Dalton to issue a written notice of dismissal of his complaint of discrimination with language informing him of his right to appeal the dismissal, without prejudice, to the EEOC.

Dalton brought a motion to dismiss the complaint, claiming that the district court lacked subject matter jurisdiction over Hodge's complaint and that the district court was required to dismiss the complaint for failure to state a claim upon which relief may be granted. The district court granted the motion to dismiss, denying Hodge's request for declaratory and mandamus relief. Hodge timely appeals.

STANDARD OF REVIEW

We review a district court's dismissal of a complaint for lack of subject matter jurisdiction *de novo*. *Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir. 1986).

ANALYSIS

[1] The United States is immune from suit unless it consents to waive its sovereign immunity. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). The terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit. *Id.* The doctrine of sovereign immunity applies to federal agencies and to federal employees acting within their official capacities. *South Delta Water Agency v. Department of Interior*, 767 F.2d 531, 536 (9th Cir. 1985).

Any waiver of immunity must be "unequivocally expressed," and any limitations and conditions upon the waiver "must be strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 160-61.

[2] The underlying action in the present case was brought against John Dalton in his official capacity as Secretary of the Navy. Thus, sovereign immunity bars Hodge's action, and the district court lacked subject matter jurisdiction over the action, unless a waiver of immunity exists. The only possible waiver of sovereign immunity in the present action is Title VII.

[3] The United States is not an employer amenable to suit under the general provisions of Title VII.[1] Suits involving federal employment are instead governed by 42 U.S.C. § 2000e-16, which provides in relevant part:

> All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5,[2] in executive agencies as defined in section 105 of Title 5[3] (including employees and applicants for employment who are paid from nonappropriated funds) . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-16(a) (footnotes added).

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[1]Title 42 U.S.C. § 2000e(b) provides: "The term 'employer' . . . does not include (1) the United States. . . ."

[2]Title 5 U.S.C. § 102 defines "military department" as: "The Department of the Army. The Department of the Navy. The Department of the Air Force."

[3]Title 5 U.S.C. § 105 defines "executive agencies" as: "[A]n Executive department, a Government corporation, and an independent establishment."

[4] Congress expressly granted the EEOC rulemaking authority to implement and enforce Title VII. 42 U.S.C. § 2000e-16(b). Pursuant to this grant of authority, the EEOC promulgated regulations defining the various forms of discrimination prohibited by Title VII and establishing the procedure for enforcement. In these regulations, the EEOC interprets Title VII as not applying to complaints of discrimination by active-duty service members:

> (a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII . . . shall be processed in accordance with this part. . . .
>
> (b) This part applies to:
>
> (1) Military departments as defined in 5 U.S.C. 102;
>
> (2) Executive agencies as defined in 5 U.S.C. 105;
>
> . . . .
>
> (d) This part does not apply to:
>
> (1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section . . . .

29 C.F.R. § 1614.103. This regulation affects "individual rights and obligations," and thus constitutes a substantive rule. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Moreover, because this substantive rule was promulgated under a specific grant of congressional authority, it has the "force and effect of law." *Id.* at 301-02.

[5] Hodge is an active-duty member of the Marine Corps and is thus a uniformed member of a military department.[4] He is therefore explicitly excluded from coverage by EEOC regulations. *See* 29 C.F.R. § 1614.103(d).

However, Hodge contends that the EEOC regulation is invalid. Hodge argues first that the regulation conflicts with § 2000e-16(a); and second, that § 1614.103(d)(1) was invalidly promulgated.

A. *Section 1614.103(d)(1) does not conflict with § 2000e-16(a).*

Under § 2000e-16(a), Title VII protection is extended to employees in "military departments" and "executive agencies." In § 1614.103, the EEOC has interpreted Title VII to not apply to uniformed members of the military departments. Hodge argues that the EEOC's interpretation conflicts with § 2000e-16(a) and is therefore invalid. We disagree.

[6] In *Gonzalez v. Department of Army*, 718 F.2d 926, 928 (9th Cir. 1983), this court held that the term "military departments" in § 2000e-16(a) "include[s] only civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel." In reaching this conclusion, we compared the definition that Congress had given "armed forces" with the definition that Congress had given "military departments." We noted that Congress had defined "armed forces" in 10 U.S.C. § 101 as "the Army, Navy, Air Force, Marine Corps, and Coast Guard." *Id.* This definition differed from the definition that Congress used for "military departments" in 5 U.S.C. § 102. *Id.* We concluded that "[t]he two differing definitions show that Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees,

[4]The Marine Corps is within the Navy Department and thus falls within 5 U.S.C. § 102's definition of "military department."

the latter of uniformed military personnel." *Id.* We then examined the legislative history of § 2000e-16(a) and concluded that the legislative history also provided "a strong inference that section [2000e-16] was not intended to extend Title VII coverage to enlisted and commissioned members of the armed forces in active service." *Id.*

All other circuits to address the issue have also held that Title VII is inapplicable to uniformed members of the military. *See, e.g., Doe v. Garrett*, 903 F.2d 1455, 1461-62 (11th Cir. 1990) (barring naval reserve member's Rehabilitation Act claim that his release from active-duty military was due to discrimination based on his handicap), *cert. denied*, 499 U.S. 904 (1991); *Roper v. Department of Army*, 832 F.2d 247, 248 (2d Cir. 1987) (barring army reserve member's claim that she was not promoted due to racial and sexual discrimination); *Stinson v. Hornsby*, 821 F.2d 1537, 1541 (11th Cir. 1987) (barring national guard member's claim that his discharge was due to racial discrimination), *cert. denied*, 488 U.S. 959 (1988); *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981) (barring national guard member's claim that she was demoted due to racial discrimination); *Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8th Cir.) (barring army applicant's claim that he was rejected due to racial discrimination), *cert. denied*, 439 U.S. 986 (1978). This interpretation of § 2000e-16(a) is consistent with § 1614.103(d)(1), which excludes uniformed members of the military departments from coverage. Therefore, § 1614.103(d)(1) does not conflict with § 2000e-16.

Hodge also argues that because "MWR is a program operated by the U.S. Navy largely out of non-appropriated funds, using largely civilian employees," it is "thus a 5 U.S.C. Sec. 105 military dept." This argument is negated by the plain language of the relevant statutes.

[7] Section 2000e-16(a) provides coverage for employees or applicants for employment in "military departments as defined in section 102" or in "executive agencies as defined

in section 105 . . . (including employees and applicants for employment who are paid from nonappropriated funds). . . ." The plain language of § 2000e-16(a) makes it clear that a "military department" must come under the definition of § 102 to be covered by Title VII. Section 102 does not distinguish between military departments operated out of appropriated funds and those using nonappropriated funds. Furthermore, § 105 defines an executive agency as: "an Executive department, a Government corporation, and an independent establishment." The term "military department" is never used in § 105. Therefore, the plain language of § 105 does not cover military departments. Finally, although the MWR is apparently operated largely out of nonappropriated funds, § 2000e-16's parenthetical discussion of nonappropriated funds modifies the definition of "executive agencies"; it does not modify the definition of "military departments."

Finally, Hodge argues that *Gonzalez* and the other cases interpreting § 2000e-16 are inapposite to his case because those cases relied upon the assumption that the relationship between a uniformed member of the armed forces and the military services is distinct from a traditional employer-employee relationship. In contrast, he argues that his claim does not arise out of his military relationship with the Navy, but rather arises out of his part-time employment conditions with a component of the Navy that is neither related to nor dependent upon his military status. In support of this argument, Hodge relies upon *Mier v. Owens*, 57 F.3d 747 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1317 (1996).

In *Mier*, the plaintiff worked as a technician for the Army National Guard. His job was a hybrid position, combining both military and civilian aspects. He served in a civilian capacity as a full-time supply management officer and in a military capacity as a commissioned officer not on active duty. To hold the civilian position, the plaintiff was required to be a member of the National Guard and to hold the commensurate military position. *Id.* at 748. The issue before this

court was whether the technician, whose job was a hybrid military-civilian position, could maintain a Title VII employment discrimination action. *Id.* We stated:

> [I]n some circumstances, personnel actions are not integrally related to the military's structure. Concerns regarding military hierarchy and discipline may not be at issue in suits alleging discriminatory conduct on the part of peers or subordinates. In addition, actions affecting civilian employees may not involve matters considered military in nature. Because Guard technicians are in a hybrid job entailing both civilian and military aspects, we conclude that Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure.

Id. at 750. We held that the claimed discriminatory actions—failure to promote, suspension from the civilian job, and retaliation—were integrally related to the military's structure and therefore were not within Title VII coverage. *Id.* at 751.

[8] Hodge's reliance on *Mier* is misplaced. First, in *Mier*, we explicitly stated that although Title VII protects civilian employees of the military from employment discrimination, it does *not* protect military personnel. *Id.* at 749. It is undisputed that Hodge is "military personnel." Second, the plaintiff in *Mier* was a hybrid military-civilian; the plaintiff was not on active-duty status. Hodge, in contrast, is not a military-civilian hybrid; he is an active-duty member of the military. The fact that a civilian could hold the part-time position in which he is employed at the enlisted club does not change his status.

[9] Furthermore, the action in the present case involves conduct which is integrally related to the military's unique structure. The MWR where Hodge works part-time is gov-

erned by a military chain of command. The MWR was under the direct supervision of Colonel Richard Crawford, Commander of the Air Station. Therefore, although the Secretary of the Navy is the named defendant as required under 42 U.S.C. § 2000e-16(c), the real party in interest in the present action is the installation commander as the operator of the club system. Thus, this action involves a legal challenge to a senior Marine Corps Officer.

[10] The doctrine of intramilitary immunity, or "the *Feres* doctrine," lends further support to the conclusion that Hodge is not covered by § 2000e-16. Under this doctrine, members of the armed forces may not bring an action against the Government or armed service personnel for injuries during activity under the control or supervision of a commanding officer. *McGowan v. Scoggins*, 890 F.2d 128, 132 (9th Cir. 1989). The doctrine is generally raised in Federal Tort Claims Act ("FTCA") cases applying *Feres v. United States*, 340 U.S. 135 (1950).

In *Feres*, there were three separate causes of action: two for medical malpractice by military doctors and one for maintenance of unsafe barracks. 340 U.S. at 137. The Court held that none of these claims was sufficient to establish a cause of action under the FTCA. The Court stated: "[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries *arise out of or are in the course of activity incident to service.*" *Id.* at 146 (emphasis added). "The presence of direct military control is sufficient to establish the activity as incident to military service." *Bon*, 802 F.2d at 1096.

[11] Although the doctrine of intramilitary immunity is generally applied in connection with the FTCA, its applicability is not limited to FTCA cases. The doctrine is instead applicable whenever a legal action "would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of

the United States." *McGowan*, 890 F.2d at 132 (citing *United States v. Shearer*, 473 U.S. 52, 57 (1985)). *See also Chappell v. Wallace*, 462 U.S. 296 (1983) (applying intramilitary immunity doctrine to both a *Bivens* action and a claim under 42 U.S.C. § 1985).

[12] In the present case, although Hodge's immediate supervisors were apparently civilian, the military chain of command retained direct control over MWR and its employees. The MWR was required to abide by regulations from higher headquarters within the military chain of command. Regulations governing operation of the MWR were issued by Headquarters Marine Corps, the Department of the Navy and the Department of Defense. These regulations from higher headquarters are mandatory on each MWR throughout the Marine Corps. Furthermore, each installation issues its own regulations governing various aspects of the MWR. These local regulations, called Base Orders, are issued under the authority of the Commanding General of the Base. Hodge, as an active-duty member of the military, was at all times "subject to military discipline for any violations of these rules, regulations, and guidelines." *Bon*, 802 F.2d at 1093. *See also Mariano v. United States*, 605 F.2d 721, 723 (4th Cir. 1979) ("All military personnel, whether patrons or employees, were subject to discipline under the Uniform Code of Military Justice for their conduct in the [Officer's] Club."). Thus, Hodge's employment at the MWR was subject to "direct military control" and as such was "incident to military service." *Bon*, 802 F.2d at 1096. Therefore, Hodge's employment falls within the doctrine of intramilitary immunity.

This conclusion is not inconsistent with *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983). In *Johnson*, we held that the *Feres* doctrine did not bar a cause of action by an Air Force noncommissioned officer who was injured in an automobile accident near a military base. The plaintiff was injured during his off-duty time, after working at his on-base job as a bartender at the Noncommissioned Officers Club ("NCO

Club"). He, along with some friends, had a party at the club after closing hours. The plaintiff was injured after he left the party when the car in which he was riding crashed into a tree. We held that the doctrine of intramilitary immunity did not bar recovery under the FTCA.

> First, at the time the government's negligence occurred, Johnson was not subject in any real way to the compulsion of military orders . . . .
>
> The fact that Johnson was not under military control easily distinguishes the other cases that have concluded that activities in NCO clubs are incident to military service. In *Mariano v. United States*, 605 F.2d 721 (4th Cir. 1979), for example, the plaintiff was employed during his off-duty hours as night manager of a Club. Plaintiff was injured while attempting to break up a fight between two patrons. In holding that the *Feres* doctrine barred plaintiff's suit, the court emphasized that official military regulations made the night manager responsible for maintaining order in the Club. Thus, the plaintiff in *Mariano* was subject to direct military control and was assigned specific duties as night manager by military regulations. Conversely, Johnson was not subject to any such direct control at the time the negligent act occurred. Indeed, Johnson was injured because the NCO Club remained open in clear violation of Air Force regulations and state law.
>
> Second, at the time of the government's negligence, Johnson was subject to military discipline only in the very remotest sense. Because Johnson was off-duty and working at a non-military second job, his activities were "purely personal."

Johnson, 704 F.2d at 1439-40 (citations omitted).

The distinctions made in *Johnson* are directly relevant to the present case. The alleged discrimination against Hodge occurred in the course of his employment at the MWR. The MWR is in the chain of military command and is subject to military rules, regulations and policies. Therefore, unlike Johnson, Hodge was subject to direct military control and discipline at the time the alleged discriminatory act occurred. Thus, the doctrine of intramilitary immunity applies and gives additional support to the conclusion that § 1614.103(d)(1)'s bar to Hodge's suit is consistent with § 2000e-16.

B. *Section 1614.103(d)(1) was validly promulgated.*

[13] Title 5 U.S.C. § 553 provides the statutory notice and opportunity for comment requirements which an agency is to follow in promulgating substantive rules. It provides that an agency must publish a proposed rulemaking in the Federal Register unless persons subject to the rules are named and are either personally served or otherwise have actual notice thereof. 5 U.S.C. § 553(b). After the required notice is given, the agency must give interested persons an opportunity to participate in the rulemaking through submissions of written data, views, or arguments. 5 U.S.C. § 553(c). After the agency has considered the relevant matter presented, the agency is required to incorporate in the rules that it adopts a "concise general statement of their basis and purpose." *Id.*

[14] In the present case, the EEOC published a "Notice of Proposed Rulemaking" and requested public comment on its proposed regulations. *See* 54 Fed. Reg. 45747 (October 31, 1989). The EEOC did not propose language specifying that uniformed members of the armed forces were not covered by Title VII. However, a comment was received regarding the coverage of uniformed members. In response to this comment, and after reviewing case law that addressed the coverage of uniformed members, the EEOC issued a final regulation that explicitly exempted uniformed members of the military departments from Title VII coverage. *See* 57 Fed.

Reg. 12634, 12642 (April 10, 1992) (citing *Johnson v. Hoffman*, 424 F. Supp. 490 (E.D. Mo. 1977), *aff'd sub nom., Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978)).

[15] Hodge argues that § 1614.103(d)(1)'s exclusion of uniformed members from Title VII coverage is not valid because it was not promulgated properly. In support of this argument, Hodge points to the fact that the exclusion was not included in the EEOC's final notice of rulemaking. We reject this argument.

A new opportunity for comment is not generated every time the agency reacts to comments that it receives. *City of Stoughton, Wis. v. EPA*, 858 F.2d 747, 753 (D.C. Cir. 1988). A final regulation that varies from the proposal, even substantially, will be valid as long as it is "in character with the original proposal and a logical outgrowth of the notice and comments." *Rybachek v. EPA*, 904 F.2d 1276, 1288 (9th Cir. 1990).

[16] Section 1614.103(d)(1) was promulgated pursuant to an explicit congressional grant of authority to the EEOC to implement and enforce § 2000e-16. The legislative history of § 2000e-16 indicates that Congress did not intend to vest the EEOC with the power to review the hiring and employment practices of the armed forces. *See Roper*, 832 F.2d at 248; *Gonzalez*, 718 F.2d at 928. In promulgating § 1614.103(d)(1), the EEOC was simply making explicit what was already implicit in the legislative history of § 2000e-16 and what was already understood to be the law. Thus, although § 1614.103(d)(1) was not specifically listed in the proposed rulemaking, the regulation is "in character with the original proposal and a logical outgrowth of the notice and comments," and was therefore validly promulgated. *Rybachek*, 904 F.2d at 1288. *See also General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565-66 (D.C. Cir. 1984)

(interpretative rules do not need notice and comment), *cert. denied*, 471 U.S. 1074 (1985).

CONCLUSION

Hodge, as a uniformed service member, is excluded from coverage under Title VII of the Civil Rights Act.[5] The district court's dismissal of the action for lack of subject matter jurisdiction is therefore affirmed.

AFFIRMED.

[5]Hodge is not without a remedy for the alleged discriminatory acts. Uniformed members of the military have statutory remedies to correct racial discrimination in the military. *See* 10 U.S.C. § 1552; *Chappell v. Wallace*, 462 U.S. 296, 303-05 (1983) (noting applicability of § 1552 to claims of racial discrimination by enlisted men and remanding for consideration of a claim of racial discrimination under 42 U.S.C. § 1985(3)). In addition, the military itself provides members with several remedies. The military EEO program provides a forum for complainants who feel that they have been the victim of discrimination. Hodge was specifically informed that this remedy was available to him. Service members may also file complaints pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938, or Article 1150 of Navy Regulations, or register a grievance with either the Inspector General or individual members of Congress.

Supreme Court, U.S.
FILED
JUL 31 1997

No. 96-1913

In the Supreme Court of the United States

OCTOBER TERM, 1996

W.L. HODGE, PETITIONER

v.

JOHN DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner is barred from suing the Secretary of the Navy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, because petitioner is a uniformed member of the United States Marine Corps.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 107 F.3d 705. The opinion of the district court is unreported.*

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1997. The petition for a writ of certiorari was filed on May 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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* The petition appendix is not paginated. We have assigned consecutive numbers to the pages therein. Additionally, the opinion of the district court was not reproduced in the appendix. That opinion can be located in the C.A. Appellant's Excerpts of Record 5-24.

STATEMENT

Petitioner, an active duty member of the United States Marine Corps, brought suit in the United States District Court for the District of Hawaii under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* He alleged that he was injured by racial discrimination in employment. The district court ruled that the relevant provisions of Title VII, which are administered through regulations promulgated by the Equal Employment Opportunity Commission (EEOC), do not provide a remedy for uniformed members of the armed forces. See C.A. Appellant's Excerpts of Record (E.R.) 5-24. Petitioner appealed, and the court of appeals affirmed that judgment. Pet. App. 1-18.

1. At the time of the relevant events, petitioner was assigned to active duty at the Camp H.M. Smith Marine Corps Base, on the island of Oahu, Hawaii. In addition to his military assignment, he worked at the Marine Corps Base Enlisted Club at Kaneohe, Hawaii. The Club is a part of the Base's Morale, Welfare, and Recreation Department (MWR). Pet. App. 5. The MWR is governed by the military chain of command and operates under the direct supervision and control of the installation commander. *Id.* at 12-13.

Petitioner had a dispute with his supervisor at the MWR over the number of hours that petitioner was required to work. He complained to the MWR's personnel office and attempted to file an administrative action alleging that he was subjected to racial discrimination in violation of Title VII. The personnel office determined that petitioner was not eligible

to file the Title VII action because he was a uniformed member of the Marine Corps. Pet. App. 5-6.

2. Petitioner filed this suit in district court to compel respondent to process his administrative action. Pet. App. 6; E.R. 6. The court granted the Secretary of the Navy's motion to dismiss petitioner's complaint and denied petitioner's motion for summary judgment. Pet. App. 6; E.R. 6-25. The court held that Section 717 of Title VII, 42 U.S.C. 2000e-16, which addresses the application of Title VII to the federal government, does not provide a remedy for uniformed members of the military departments. E.R. 10-14.

The district court examined the EEOC's regulations governing the application of Section 717, 29 C.F.R. Pt. 1614, and it concluded that the EEOC had "acted within its delegated authority to exclude complaints by active duty service members from the coverage of [Section 717]." E.R. 15. The court rejected petitioner's contention that he was entitled to Title VII relief based on his part-time employment at the MWR. E.R. 16. The court found that the MWR is governed by the military chain of command and concluded that petitioner's action "involves a legal challenge to a senior Marine Corps officer and is subject to the rationale of the line of cases which has precluded discrimination claims by members of the military in light of the unique relationship existing therein." *Ibid.*

The district also relied on the doctrine of intra-military immunity in denying relief. See E.R. 16-20, citing *McGowan* v. *Scoggins*, 881 F.2d 615, 619-620, opinion amended and superseded on denial of reh'g, 890 F.2d 128 (9th Cir. 1989), and other cases. The court noted that uniformed members of the military have

other statutory remedies to address complaints of discrimination in the military. See E.R. 20-22, citing 10 U.S.C. 1552 and 42 U.S.C. 1985(3). In light of its holding that petitioner had no right to a Title VII remedy, the court concluded that the issue of petitioner's right to mandamus relief was moot. *Id.* at 22-23.

3. The court of appeals affirmed. Pet. App. 1-18. Like the district court, the court of appeals concluded that petitioner was "explicitly excluded from coverage by EEOC regulations." *Id.* at 9, citing 29 C.F.R. 1614.103(d). The court adhered to its previous decision in *Gonzalez* v. *Department of the Army*, 718 F.2d 926 (9th Cir. 1983), which held that Section 717 of Title VII allows suits only by "civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel." *Id.* at 928. The court of appeals noted that all the other circuits that have addressed the issue have also held that Title VII is inapplicable to uniformed members of the military. Pet. App. 10. It found no reason to depart from those rulings in this case. *Id.* at 10-18.

ARGUMENT

The court of appeals held that Title VII does not provide a remedy to persons, such as petitioner, who are uniformed members of a military service. That decision is correct, it does not conflict with any decision of this Court or another court of appeals, and it does not warrant further review.

1. Title VII does not include the United States within the statute's general definition of an "employer." See 42 U.S.C. 2000e(b) (defining "employer" and excluding the "United States"). Congress instead provided remedies for discrimination in federal

employment through Section 717 of Title VII, 42 U.S.C. 2000e-16, which provides a proscription against discrimination, 42 U.S.C. 2000e-16(a) (1994 & Supp. I 1995), and directs the EEOC to issue rules to implement and enforce that policy in the federal workplace, 42 U.S.C. 2000e-16(b). See Pet. App. 6-8.

Section 717(a) of Title VII provides that "personnel actions affecting employees * * * in military departments as defined in section 102 of title 5 [of the United States Code] * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) (1994 & Supp. I 1995). The EEOC has implemented that provision through regulations that allow civilian employees of the military departments to invoke prescribed remedies. 29 C.F.R. 1614.103(b). The EEOC's regulations do not extend, however, to uniformed "members" of the military departments. 29 C.F.R. 1614.103(d). See Pet. App. 7-8.

The EEOC's regulations rest on a sound interpretation of Section 717, which refers to the term "military departments" as it is used elsewhere in the United States Code. Section 102 of Title 5 of the United States Code defines "military departments" as "The Department of the Army," "The Department of the Navy," and "The Department of the Air Force." By contrast, Section 101(4) of Title 10 of the United States Code defines "armed forces" to include "the Army, Navy, Air Force, Marine Corps, and Coast Guard." As the court of appeals explained:

> [T]he two differing definitions show that Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees, and the latter of uniformed

military personnel.

Pet. App. 9-10, quoting *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 928 (9th Cir. 1983), That distinction also accords with Section 717's legislative history. *Ibid.*

As the court of appeals recognized in *Gonzalez*, Section 717's distinction between uniformed members and civilian personnel does not leave petitioner without a remedy for discrimination. See 718 F.2d at 929 n.2. Petitioner may pursue statutory remedies, designed specifically for military members, to remedy wrongs committed within the service. See 10 U.S.C. 938, 1552. In addition, a military member may pursue administrative remedies for discrimination through the military's equal opportunity programs. See E.R. 21. Petitioner was specifically informed that this remedy was available to him. *Ibid.*

2. The court of appeals' decision in this case is consistent not only with *Gonzalez*, but with the decisions of every other court of appeals that has considered the question. Those courts have uniformly held that Title VII does not provide uniformed members of the armed forces with a remedy for discrimination. See *Roper* v. *Department of the Army*, 832 F.2d 247, 248 (2d Cir. 1987) (rejecting Army Reserve member's claim of discriminatory non-promotion based on sex and race); *Stinson* v. *Hornsby*, 821 F.2d 1537, 1541 (11th Cir. 1987) (rejecting National Guard member's claim of discriminatory discharge based on race), cert. denied, 488 U.S. 959 (1988); *Taylor* v. *Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981) (rejecting National Guard Reserve recruiter's race discrimination claim); *Johnson* v. *Alexander*, 572 F.2d 1219, 1223-1224 (8th Cir.) (rejecting Army applicant's claim of discriminatory

rejection based on race), cert. denied, 439 U.S. 986 (1978); see also *Doe* v. *Garrett*, 903 F.2d 1455, 1461 (11th Cir. 1990) (rejecting Naval Reserve member's claim under the Rehabilitation Act of discriminatory release from active duty based on handicap), cert. denied, 499 U.S. 904 (1991).

3. Petitioner appears to argue that his situation is distinguishable because he is "part-timed employed by a non-appropriated funded agency of the U.S. Navy during his off-duty hours" (Pet. i). The court of appeals considered and properly rejected that claim. As the court observed, the relevant statutes provide no basis to "distinguish between military departments operated out of appropriated funds and those using nonappropriated funds." Pet. App. 11. The court also noted that even though petitioner was employed outside of his normal duty hours, his employment at the MWR, a department of the Marine Base, was "governed by the military chain of command," *id.* at 13, "was subject to 'direct military control,'" *id.* at 14, and "as such was 'incident to military service,'" *ibid.* In any event, in the absence of a conflict in the circuits, the factual distinction that petitioner posits does not give rise to an issue of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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